ANDREW GORDON McKINLEY
ANNIE BENNETT
(ON RECONSIDERATION)

IBLA 76-23, 76-25 Decided February 2, 1982

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment applications and evidence of occupancy. AA 7922 and AA 7017.

Petition for reconsideration granted: Christina Lavern Hanlon, 23 IBLA 36 (1975), and decision appealed from are vacated as they relate to AA 7922 and AA 7017; case remanded.

1. Alaska: Native Allotments

   Native allotment applications for lands in the Tongass National Forest may be allowed only if (1) the application is founded on occupancy prior to the inclusion of the lands within the forest or (2) an authorized officer of the Department of Agriculture certifies that the land in the application is chiefly valuable for agricultural or grazing purposes.

2. Alaska: Native Allotments

   Secretarial guidelines of Oct. 18, 1973, intrepreted the provisions of 43 U.S.C. § 270-3 (1970) to require an applicant for a Native allotment to complete 5 years use and occupancy prior to any withdrawal of the lands sought. Secretarial Order No. 3040 of May 25, 1979, rescinded these guidelines in favor of an interpretation requiring the commencement of use and occupancy or the filing of a Native allotment application prior to a withdrawal of the land.

3. Alaska: Native Allotments

The substantial use and occupancy contemplated by the Native Allotment Act must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents. An applicant's use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittant use.

APPEARANCES: Geoffrey A. Wilson, Esq., Alaska Legal Services Corporation, Juneau, Alaska, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In Christina Laverne Hanlon, et al., 23 IBLA 36 (1975), the Board affirmed decisions of the Alaska State Office, Bureau of Land Management (BLM), rejecting several Alaska Native allotment applications, including AA 7922 and AA 7017. Appellants, by their attorney, Alaska Legal Services Corporation, requested reconsideration of the Board's decision and incorporated by reference the statement of reasons previously submitted on July 16, 1975, in the request for reconsideration of Louis P. Simpson, 20 IBLA 387 (1975). That petition for reconsideration was denied by order issued on October 29, 1980. Appellants assert that the Board failed to consider appellants' argument of denial of equal protection and misunderstood the nature of the rights claimed by appellants. Additionally, appellants urge that the decision in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), requires that a hearing be afforded to an applicant for a Native allotment before his application is denied.

[1] Appellant's application was filed pursuant to the Act of May 17, 1906 (the Act), 34 Stat. 197, as amended by the Act of August 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270-1 through 270-3 (1970). The Act authorizes the Secretary of the Interior to allot not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska, including lands in national forests, to any Indian, Aleut, or Eskimo of full or mixed blood who resides in and is a native of Alaska, and who is the head of a family or is 21 years of age. Allotments may be made in national forests if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land is chiefly valuable for agricultural or grazing purposes. 43 U.S.C. § 270-2 (1970). No allotment shall be made to any person until the applicant has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of 5 years. 43 U.S.C. § 270-3

(1970). The Act was later repealed on December 18, 1971, subject to pending applications, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1976).

Although Congress approved certain Native allotments in section 905(a)(1) of the Alaska National Interest Lands Conservation Act, P.L. 96-487, 94 Stat. 2371, 2435 (1980), it did not approve applications for land which was withdrawn as of December 13, 1968. The lands which are the subject of appellants' applications were withdrawn prior to December 13, 1968. Thus, the provisions of section 905 are deemed not to apply. Appellants' applications would only be approved if they meet the requirements of the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed, 43 U.S.C. § 1617 (1976).

The lands described in appellants' applications are within the Tongass National Forest and as such were withdrawn from all forms of appropriation under the public land laws except the mineral leasing laws. Andrew Gordon McKinley and Annie Bennett were born prior to the time the lands applied for were included in the forest. McKinley was born on February 16, 1911, and the lands involved in her application were temporarily withdrawn on April 1, 1924, by Exec. Order No. 3983 pending a determination as to the advisability of including them in a national monument. Presidential Proclamation No. 1733 on February 26, 1925, revoked Exec. Order No. 3983. The lands which include those in McKinley's application were later withdrawn by Presidential proclamation on June 10, 1925, and included in the Tongass National Forest. Bennett was born on May 10, 1897, and according to her application, has claimed occupancy since 1900. The lands listed in her application were withdrawn by Presidential proclamation of February 16, 1909. These appellants were 13 and 12 years of age, respectively, on the crucial dates of the withdrawals.

No rights to land are acquired on the basis of use and occupancy by an applicant's ancestors. A Native who applies for withdrawn lands must show that he complied with the law prior to the effective date of the withdrawal, and he may not tack on his ancestor's use and occupancy to establish a right for himself prior to the withdrawal. Larry W. Dirks, Sr., 14 IBLA 401 (1974).

Secretarial guidelines of October 18, 1973, and subsequent decisions of the Board, Susie Ondola, 17 IBLA 359 (1974); Christian G. Anderson, 16 IBLA 56 (1974), gave rise to a policy whereby an applicant must complete 5 years use and occupancy prior to withdrawal of the land. However, Secretarial Order No. 3040 of May 25, 1979, abolished this interpretation. That order stated in part:

> Sec. 3 Policy Decision. A. I have undertaken a review, with the Solicitor, of the five-year prior rule. I

> have approached the review from the premise that the Alaska Native Allotment Act was an act passed for the benefit of Natives and should, therefore, be liberally construed in favor of Natives. The Act itself does not contain the five-year prior rule as an express requirement. The policy appears to have originated as a result of the exercise of agency discretion. Since it was issued, however, the United States Court of Appeals for the Ninth Circuit has ruled, in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), that the range of the Department's discretion, in dealing with Native allotments is narrower than was previously supposed. Whether or not the five-year prior rule is a proper exercise of the Department's discretion, it is not consistent with my policy, that of liberally construing acts passed for the benefit of Natives.
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> B. Accordingly, I hereby rescind the five-year prior rule in favor of a rule which merely requires that the full five years use and occupancy must be completed prior to the granting of the Native allotment application, provided that the applicant has either filed for a Native allotment or commenced use and occupancy prior to a withdrawal of the land.

[3] Reliance on the Secretarial guidelines of October 18, 1973, is no longer proper. While appellants' use and occupancy allegedly predated the 1909 withdrawal and hence met the requirements of Secretarial Order No. 3040, the substantial use and occupancy contemplated by the Act must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents. Arthur C. Nelson (On Reconsideration), 15 IBLA 76 (1974). An applicant's use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. 43 CFR 2561.0-5(a); Natalia Wassilliey, 17 IBLA 348 (1974).

Further, the Board has ruled that Native allotment applicants who were 8 years old or older at the date that the land was segregated from entry and who assert independent use and occupancy of the land should be afforded notice and an opportunity for a hearing to prove the adequacy and independence of their use and occupancy. William Bouwens, 46 IBLA 366 (1980). As the case file itself does not provide adequate information to determine the independence of appellants' use, the State office should provide appellants an opportunity for a hearing by initiating contest proceedings against the application. See Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellants'

petition for reconsideration is granted; our decision and the decision appealed from are vacated as they relate to AA 7922 and AA 7017, and the case remanded for initiation of contest proceedings.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge